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November 5, 2001

ORIGINAL

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 01-92, Developing a Unified Intercarrier Compensation Regime

Dear Ms. Salas:

Enclosed please find the Reply Comments of the National Association of State Utility Consumer Advocates (NASUCA) in the above-referenced docket. I have enclosed four (4) copies pursuant to the Commission's Comment Filing Procedures. Additionally, Comments have been sent to parties on the attached service list and a diskette has been submitted.

I have also enclosed an additional copy for receipt-stamp which I ask that you return to me in the enclosed postage-paid envelope.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

Michael J. Travieso

Michael J. Travieso
People's Counsel
Maryland Office of People's Counsel

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Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. **20554**

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In The Matter of Developing A Unified Intercarrier Compensation Regime	)))	CC Docket No. **01-92**

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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November **5,2001**

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EXECUTIVE SUMMARY

The National Association of State Utility Consumer Advocates (NASUCA) remains categorically opposed to the proposal of the Federal Communications Commission to establish a Unified Intercarrier Compensation Regime as proposed in the Notice of Proposed Rulemaking (NPRM) of the Federal Communications Commission released in FCC Docket No. 01-132 and CC Docket No. 01-92.

The Initial Comments of the supporters of Bill-and-Keep have done nothing to strengthen the Commission's arguments in the NPRM. The FCC has proposed bill and keep in large part as a resolution to the asymmetrical flow of traffic between the CLECs and ILECs. The submissions have highlighted that the traffic flow is a natural free-market response to a barrier to entry created by the ILECs rather than the establishment of too high of a price for the termination of traffic.

The Commission's proposal to adopt mandatory Bill-and-Keep should be rejected on the following grounds:

(i) Legal grounds since it is not consistent with the Telecommunications Act of 1996, and would limit the role of State Commissions;

(ii) Practical grounds since it would increase the regulatory burden on the FCC and the State Commissions;

(iii) Analytical grounds since the NPRM has not sufficiently established that the assumptions underlying its Bill-and-Keep Proposals (COBAK and BASICS) are robust;

(iv) Equity grounds since the adverse equity and consumer impacts of Bill-and-Keep would lead to large increases in end-user charges – especially on rural consumers;

(v) Efficiency grounds since there is nothing welfare-enhancing about Bill-and-Keep – by controlling prices the market can not properly operate according to principles of market pricing (e.g., whereby different consumers pay different prices depending on the valuation they place on receiving or initiating a call); and

(vi) Policy grounds since judicious policy implementation requires instruments which are not clumsy, and allow for the balancing of multiple objectives and constraints – price controls disguised as Bill-and-Keep are well-known to be a clumsy instrument for prudent policy.

Instead, NASUCA recommends that:

(i) The Commission should adopt a pricing structure based on capacity charges – especially since future technology changes will further support capacity-based pricing;

(ii) The Commission should adopt only those policies which would not undermine or pre-empt the duties of State Commissions that have been expressly identified by Congress;

(iii) The Commission should not adopt policies such as Bill-and-Keep which would be anticompetitive;

(iv) The Commission should not adopt Bill-and-Keep because the support of the ILECs represents a flip-flop in their positions from 1996 to 2001 and indicates that many are adapting their positions to the situation rather than on any solid analytical basis; and

(v) The Commission should adopt only those policies which would not discourage the use of the internet, and technology advances, in general.

I. *The Proposed Changes would have Adverse Impacts on Consumers*

The Commission's Proposal would Result in Large and Unavoidable Increases in End-User Rates

As a consumer advocacy organization, NASUCA is most concerned with the consumer impacts of the FCC's proposed policy changes. These are of paramount importance, and are addressed first in the reply comments. Suffice *to* say, NASUCA believes that the proposed changes will lead to large increases in end-user charges – which will particularly adversely affect rural consumers – since there will be no other alternative mechanism for recovering the termination costs currently collected under access charges and reciprocal compensation agreements.

In the NPRM, the FCC did not seriously discuss how the recovery of lost interconnection and access revenue should be addressed. The comments provided by NASUCA and several of the other respondents highlight that the FCC's proposal will create new regulatory burdens. There will still be a need to figure out the cost of termination, and under the FCC's proposal, it is likely that the cost will be recovered through a per-line end-user charge rather than a per minute rate.[1] Such a transition is inefficient, because traffic sensitive costs would be recovered through a fixed customer line charge.

The comments of Focal Communications Corporation, Pac-West Telecommunications, RCN Telecom Services, and US LEC Corporation best present the argument about impacts on end-user charges:

> "If Bill-and-Keep were adopted, the Commission would need to establish new incumbent local exchange carrier (ILEC) federal end-user charges, and closely regulate them in order to assure they are reasonable. These end-user charges would include charges to recover ILEC costs that are currently recovered from interexchange carriers (IXCs) in interstate exchange access charges. States would not be responsible for assuring that ILECs charges to end-users to recover the costs of interstate exchange access are reasonable because these costs are jurisdictionally interstate. Even assuming states would choose to implement Bill-and-Keep for intrastate services, states will be unwilling to take responsibility for recovery of the costs of interstate exchange access by, for example, letting end-user recovery take the form of rate increases for local service. Therefore, under Bill-and-Keep the Commission would need to

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[1] End user charges are typically either traffic sensitive or set on a per-line basis. In the NPRM the Commission contended that the cost of terminating is only non-zero when a call arrives at the switch during the peak hour. The Commission also suggested that it would be inefficient to recover capacity costs through a per minute interconnection rate. The Commission would not pass the "straight-face test" if were to simultaneously argue that traffic sensitive rates are inefficient for interconnection but efficient for retail pricing. Therefore it is likely that if the Commission were to adopt Bill-and-Keep, the Commission would support recovery of the lost revenue through a per-line end-user surcharge.

establish new federal end-user charges in order to permit ILECs to recover these costs and to assure that charges are reasonable."[2]

The empirical analysis provided by the National Exchange Carrier Association (NECA) is most illuminating. For rate-of-return LECS moving to a Bill-and-Keep regime, the result would be a shift of more than $1.5 billion from interstate carriers to end-users.[3] By eliminating access charges, an additional burden is not only imposed on end-users, but also on regulators to address the associated revenue loss issues and implementation of new end-user charges.

"For July 1, 2003, NECA projects a total interstate access charge revenue requirement of $2,973 million. Per minute access rates would recover $1,621 million -- $593 million would come from SLCs, and $759 million would come from Local Switching Support (LSS) and Long Term Support (LTS). In 2003, using today's methods and SLCs, 55% of total interstate access charges will be recovered from IXC's as per minute access charges.

The shift to end-users which would occur with the imposition of COBAK would be burdensome and inequitable. NECA projects that setting per minute access rates to recover just 50% of Switched and Dedicated Access costs would reduce access charges paid by IXCs to $136 million, less than 5% of total access revenue requirements.

This is more than a ten fold decrease in the portion charged IXCs in current per minute rates. Such a drastic change is unreasonably low and bears no relationship to traditional ratemaking principles that dictate the allocation of joint and common cost among cost-causers. There is no evidence or theoretical support demonstrating that the IXCs should bear as limited a burden as 5% of the interstate revenue requirement."[4]

According to the analysis of NECA, the average impact on its consumers would be $9.80 per month. In addition, approximately 2/3 of its Rate-of-Return LECs would have to raise rates by over $10 per month – with the effects much higher in rural areas ranging up to $69 per month.[5]

Finally, the California Public Utilities Commission estimates that end-user rates would need to increase by $20 per line per year. This is based on an estimate of $3.2 billion in interstate traffic-sensitive switched access charges for price cap LECs (based on the CALLS order) which

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[2] Focal Communications Corporation, Pac-West Telecommunications, RCN Telecom Services, and US LEC Corporation -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 6-7

[3] National Exchange Carrier Association, Inc. -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 5

[4] National Telephone Cooperative Association -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 12

[5] National Exchange Carrier Association, Inc. -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Pages 5-6

would have to be transferred to end-users under Bill-and-Keep.[6] The Commission goes on to point out that, at a minimum, Bill-and-Keep would require caps on increases in end-user charges to prevent rate shock.

Clearly, increases in monthly service charges of $1.66 to $10 are not insignificant for consumers – especially low-income consumers – and could impair the provision of universal service.[7] Even BellSouth acknowledges that:"...unless a federal transition mechanism to assist the states is established, it is questionable as to whether the state commissions could accomplish the transition to Bill-and-Keep without creating severe dislocations among many end-user groups."[8] The NPRM has not addressed the impact of the proposal on universal service.

The reliance on a flat rate end-user charge to recover traffic-sensitive costs is inefficient and inequitable because the use of the network varies greatly among customers. If the traffic sensitive costs of the network are recovered through a flat rate end-user charge, low usage customers will subsidize high-usage subscribers. The data presented by the California PUC and NECA highlight that the distortions are hardly trivial.

The proponents of Bill-and-Keep talk very little about recovering the costs of network connection, and the impacts on end-users of that recovery. The proponents of Bill-and-Keep provide no guidance on how efficient prices can be established–rather they just argue for maximum regulatory flexibility (which would not actually result under Bill-and-Keep), and provide no indication of how retail rates will be adjusted.

The proposed changes would lead to large increases in end-user charges in order to cover termination costs, and this would clearly adversely impact consumers. The proposed changes would also increase local rates and decrease long-distance rates – leading to an unacceptable result whereby a relatively non-competitive service (local service) would subsidize a relatively competitive one (long-distance service) in violation of Section 254(k). Clearly, this would also more adversely impact lower-income consumers who rely more heavily on basic local service.

Moreover, the Commission's proposed changes would adversely effect the provision of Universal Service. Section 254(b) (3) of the 1996 Telecommunications Act states:

> "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."

[6] California Public Utilities Commission -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Pages 6-7

[7] As discussed below, the impact on customers of rural companies could be even greater.

[8] BellSouth -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 16

The Proposed Changes would have Especially Adverse Impacts on Rural Consumers

For background, it is useful to note the differences in costs and provisions of services for rural and non-rural carriers:

> "The population density for areas served by rural carriers averages to only 13 persons per square mile, compared with 105 persons per square mile in areas served by non-rural carriers. As was pointed out by the Rural Task Force, the total investment in plant per loop is substantially higher for rural carriers compared to non-rural carriers. On average, total plant investment per loop is more than $5,000 for rural carriers compared to less than $3,000 for non-rural carriers. Further, average total plant investment per line for rural carriers increases as the line size of the study area decreases. Average plant investment per line ranges from 3,000 for rural carriers with the largest study areas to more than $10,000 for carriers with the smallest."[9]

Several of the Comments specifically address the issue of effects on rural consumers. NASUCA concurs with the analysis presented in these arguments that the Commission's proposed changes would most adversely effect rural consumers. Clearly, with higher costs of providing service, and no other way to recover termination charges under Bill-and-Keep, rural end-user prices would have to be increased. Moreover, the empirical evidence in support of this is quite compelling based on a review of the material submitted to the Commission. The table below summarizes some of the estimated effects on rural consumers based on NASUCA's review of the comments provided under these proceedings.

Summary of Impact of Proposed Changes under NPRM on Rural Consumers

Commenter	*Impacts*
Alaska Regulatory Commission	Bill-and-Keep on interstate access would increase end-user rates by over $20/month for 1/3 of rural Alaskan companies Increases range from $10-$59 per month for most rural companies for access under Bill-and-Keep Combined intrastate and interstate effects of Bill-and-Keep would be $35-$100 per line per month for over 1/3 of rural Alaskan companies State Universal service Fund would have to increase by $22 million in order to ensure that the effects of Bill-and-Keep on consumers would not be higher than $10 per month per line With only 500,000 access lines statewide and high poverty in many rural areas, the general population would not be able to support large increases in the Universal Service Fund

[9] National Telephone Cooperative Association -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) – Page 11

Commenter	Impacts
CenturyTel, Inc.	Bill-and-Keep would shift up to $200 million in additional costs onto CenturyTel's local exchange network The associated increase in costs to the consumer would be over $100 per year
GVNW Consulting	Additional impact of interstate costs from Bill-and-Keep would increase monthly costs per line by over $20 for 70% of companies, and over $50 for 20% of companies
National Exchange Carrier Association	Increase in cost to rural customers would average $46.10 per line in those areas with fewer than 500 lines Increase in cost to rural customers would average $13-$26 per line in those areas with 500-10,000 lines Increase in cost to rural customers would average $10-$13 per line in those areas with 10,000-50,000 lines Increase in cost just to offset loss of intrastate access revenue under Bill-and-Keep would range from $9-21 per month
Oklahoma Rural Telephone Coalition	Intercarrier Compensation accounts for 35% of revenues which would be wiped out under Bill-and-Keep Average local exchange rates would increase by $62 per month for member companies ($30 due to lost federal interconnection compensation and $32 from lost state interconnection compensation)
Western Alliance	Increases of $50-$100 per month for rural areas in 24 western states if access charges are replaced by Bill-and-Keep Members rely on interstate access charges and federal universal support for 45-70% of revenue base, and this would be jeopardized by proposed changes Local service rates and universal support mechanisms would need to be increased to recover $1.229 billion in lost interstate access revenues in 24 western states ($2.243 billion nationwide) under proposed Bill-and-Keep arrangements

Sources: Alaska (Pages 2-3), CenturyTel (Page 6), GVNW (Page 4), NECA (Appendix I – Page 2), Oklahoma (Pages 4, 7), Western Alliance (Pages ii, 5, 6)

Clearly these effects are significant and warrant the review of the Universal Service Joint Board. The Lifeline Program may need to be altered should Bill-and-Keep be adopted, but it is unlikely that all of the effects on rural consumer could be addressed by this program.[10] Furthermore, the increase in rural end-user charges would likely result in end-user prices that would violate the section 254 requirement those rural and urban rates be "reasonably comparable."[11] In short, adoption of Bill-and-Keep will amount in a massive transfer away from rural consumers, absent a sizeable increase in the Universal Service Fund.

Those who maintain service will pay significantly more, and those who cannot afford the increases will lose telecommunications services – thus undermining the objective of Universal Service as stated on the 1996 Telecommunications Act.

In short, the Commission must be careful not to move too quickly on Bill-and-Keep due to the adverse impacts on rural consumers. Because Bill-and-Keep does not allow for settlements between carriers, it implicitly eliminates the concept of geographic toll rate cost-averaging across networks which is crucial for Universal Service and rural service.[12]

II. The Effects of the Proposed Changes would be Anti-competitive and Inefficient

As pointed out in the affidavits of Ordover and Willig attached to AT&T's submission, the crucial issue is that Bill-and-Keep is not based on forward-looking economic cost-based prices. Unless it is, there is no reason to think Bill-and-Keep would be superior to a Caller Pays system of assessing termination charges as means of providing efficient and proper signals to consumers and firms.[13] The FCC has concluded that bill and keep is inefficient. In its Local Competition Order the Commission emphasized:

> "In general, we find that carriers incur costs in terminating traffic that are not *de minimis,* and consequently, Bill-and-Keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, Bill-and-Keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic, payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with traffic flowing in the other direction."[14]

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[10] Regulatory Commission of Alaska -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 6

[11] §254(b)(3).

[12] Home Telephone -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 13

[13] ATT -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 13

[14] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996), paragraph 1112.

The NPRM provides little justification for the Commission's proposed position reversal on the efficiency of bill-and-keep. Furthermore, by not requiring LECs to negotiate termination charges, the Commission's proposals under the NPRM are anti-competitive. As pointed out by KMC Telecom, cost-based intercarrier compensation rates are crucial to the development of competition and mandatory Bill-and-Keep would blunt competitive forces:

> "The prospect of having to pay symmetrical intercarrier compensation rates to competitive carriers restrains ILECs from exercising their market power to the detriment of competition. The downward trend in reciprocal compensation since the **1996** Act would never have occurred without symmetrical intercarrier compensation rates."
>
> "If Bill-and-Keep is mandated, there will be no incentive for the ILECs to use the networks of the CLECs in an efficient manner, or to structure their own networks in a way that will allow the CLECs to lower their costs. Rather, mandatory Bill-and-Keep would create incentives for ILECs to reconfigure their networks in order to maximize the costs that other carriers incur to terminate ILEC-originated call while minimizing the costs that ILECs incur to terminate calls originated by other carriers."[15]

Finally, the California Public Utilities Commission makes a persuasive argument regarding the potential harm bill-and-keep poses to the pricing of unbundled network elements (UNEs):

> "[C]urrent methods of pricing UNEs and reciprocal compensation provide somewhat symmetrical incentives for ILECs to maintain reasonable rates, but Bill-and-Keep could remove this balance, providing incentives for ILECs to press for higher UNE rates.""

The FCC should not protect firms that have made bad business decisions

The FCC has attempted to justify bill-and-keep as a sensible solution to the asymmetrical flow of traffic between CLECs and ILECs. The asymmetric traffic flow is due to the decision by ISPs to obtain service from CLECs. As pointed out by the Texas Office of Public Utility Counsel it was rational for the ISPS to obtain service from the CLECs because they provided better service and substantial cost savings through collocation. The ILECs were unwilling to allow the ISPs to collocate in their central offices." Protecting ILECs from bad business decisions regarding the collocation of ISPs is not the role of the FCC, and therefore Bill-and-Keep for ISP-

[15] KMC Telecom -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) – Pages 3-4

[16] California Public Utilities Commission -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 5

[17] Texas Office of Public Utility Counsel, In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) – Pages 27-29. Also, see, National Association of State Utility Advocates, In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) – Pages 18-20.

bound traffic should be rejected. The arguments of Focal Communications Corporation, Pac-West Telecommunications, RCN Telecom Services, and US LEC Corporation, summarized below, are most persuasive.

These companies noted in their comments that ILECs strongly opposed Bill-and-Keep in 1996 on the presumption that they would be terminating significantly more calls on CLEC networks than the CLECs would on the ILECs' networks. However, the ISP market was under-served by ILECs, and the CLECs attracted this business by offering state-of-the-art local fiber networks, and by offering to collocate ISP equipment."

It is not a problem that CLECs have targeted ISPs as customers. There is an excellent reason why ISPs should all collocate with CLECs, and it has nothing to do with reciprocal compensation. ILECs have said enhanced service providers such as ISPs cannot collocate in their central offices. So ISPs can save a tremendous amount of money by collocating with CLECs, allowing them to avoid the costs of loops and transport for termination of modem pools back to the central office.[19] Indeed, even if reciprocal compensation were priced at zero, because ILECs will not allow collocation of ISPs, it would still be a great opportunity to take business for CLECs.

The Bill-and-Keep proposals under the NPRM would now abolish all intercarrier compensation for ISP-bound traffic, but this could signal investors that the Commission will protect ILECs from competition which they had not foreseen in 1996. As pointed out by Economics and Technology, Inc. in its analysis of ISP traffic:

> "It would be entirely inappropriate at this time to now engage in what amounts to nothing short of a bail-out of those ILEC errors. In competitive markets, competitors live or die by their own business judgments and decisions, and it is not the role of regulators to backstop these market choices by after-the-fact protective measures."[20]

The positions of the ILECs now favoring Bill-and-Keep for ISP traffic is just one example of how they have shifted their positions since 1996 as circumstances have changed not always in their favor. Section VII provides additional example and analysis of changes in the positions of ILECs.

III. The Proposed Changes would Make Regulation more Burdensome and Violate the Telecommunications Act of 1996

From an implementation standpoint, increases in end-user rates which would be required to cover the traffic sensitive termation costs would add an additional layer of regulatory control to

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[18] Focal Communications Corporation, Pac-West Telecommunications, RCN Telecom Services, and US LEC Corporation -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 19-22

[19] National Association of State Utility Advocates, In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) – Pages 18-20.

[20] Economics and Technology, Inc. -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 27

be exercised by the FCC and State Commissions, and make implementation of Bill-and-Keep more burdensome. Regulation would also be more burdensome under COBAK due to the need for a regulatory body to define "central offices" on a case-by-case basis for each CLEC and ILEC in order to define the points of interconnection.[21] On the other hand, under BASICS, regulatory authorities would need to define what constitutes incremental connection facilities and costs.[22] In short, Bill-and-Keep would replace the current system of regulation of interconnection agreements with regulations regarding the costs of interconnection since the Commission would have to struggle to quantify interconnection costs. This is hardly an improvement.

Focal Communications Corporation, Pac-West Telecommunications, RCN Telecom Services, and US LEC Corporation make an especially persuasive argument regarding the need for more regulation under Bill-and-Keep at both the federal and state levels;

> "The unstated assumption of the *Intercarrier Compensation NPRM* that Bill-and-Keep would be deregulatory is invalidated by the enormous task of converting the interstate exchange access charge scheme into a program of federal end-user charges. At a minimum this would entail all of the separations, accounting, and cost allocations involved in the current scheme, and might involve more complicated rules depending on how federal end-user charges were implemented. Moreover, the idea posited in the *NPRM* that Bill-and-Keep for exchange access would eliminate the need for allocation of common costs is erroneous. An allocation of common costs would be involved in the development of end-user charges to the same extent as currently employed in developing exchange access charges because the same costs are involved.
>
> The fact that the *NPRM* made this erroneous assumption demonstrates the inherent illogic in the Bill-and-Keep proposals. No one will be avoiding the "heavy lifting" of an allocation of common costs. Indeed, the Bill-and-Keep proposals under consideration would require not only the establishment of new federal end-user charges with an allocation of common costs, but it would require numerous state commission rate cases to accomplish the same result on the state level... Adopting a Bill-and-Keep regime would require every state commission to reexamine every ILEC local service tariff in order to reallocate the terminating switching function from the calling party's rates to the called party's rates. The *NPRM* does not adequately consider the magnitude of this enterprise, the costs associated with it, or whether any purported benefit from adopting Bill-and-Keep could possibly be worth the undertaking."[23]

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[21] Verizon Wireless -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 22

[22] Verizon Wireless -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 24

[23] Focal Communications Corporation, Pac-West Telecommunication, RCN Telecom Services, and US LEC Corporation -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 10

The adoption of an end-user charge to recover interconnection costs is inconsistent with the intention of the Act. Many of the ILECs argue that Bill-and-Keep is legal so long as the FCC has in place a mechanism, such as an end-user charge, by which carriers can be certain to recover their costs. They are arguing that Bill-and-Keep is legal because the congress said that a mechanism must be in place that allows the carriers to recover their costs of terminating the calls – but not that intercarrier compensation payments are required.[24]

However, Section 252 of the Act states:

> (2) Charges for transport and termination of traffic:
>
> (A) In general -- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

The act clearly is discussing recovery of costs in a reciprocal manner from other carriers. This passage can not be read to mean that the money should be recovered in a reciprocal way from end-users without intercarrier compensation payments. There was no need for Congress to pass a law stating that costs should be recovered from end-users. Absent a mechanism of recovering costs from the originating carrier, a LEC could only recover its costs from its end-users. If it could not recover its costs from end-users, the rates would be confiscatory. Therefore, if all Congress intended was the recovery of costs from end-users, there would have been no need for the passage of this part of the Act.

IV. The Commission's Proposals do not Reflect a Cost-Based Pricing Structure

The Commission is concerned about overcharging for termination, as elucidated in the NPRM and many of the submitted comments. However, the Commission must still be careful to adopt a policy which does not set termination charges below cost. This must be done in order to promote and implement a policy which would be fair to consumers, fair to all firms operating in the telecommunications industry, and provide proper incentives regarding investment and consumer decisions and technology choices.

Bill-and-Keep amounts to setting termination charges at zero, which is clearly below cost since termination costs are non-zero. As the Ad Hoc Telecommunications Users Committee points out:

[24] SBC -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 5

> "...purposely pricing below cost is every bit as market distorting as pricing above costs, and is certainly no more sustainable over the long term."[25]

Even one of the proponents of Bill-and-Keep makes a comment which is even more damaging to the case for Bill-and-Keep:

> "It is important to understand that Bill-and-Keep does not require carriers to provide terminating services for 'free.' Rather, it is a type of barter system wherein each carrier obtains terminating services from the other in exchange for the consideration that it will reciprocally provide such services to the other carrier."[26]

Barter systems have generally only been used in planned economies characterized by shortages, and markets without currency such as in the Stone Age. NASUCA therefore wonders if it is sound decision-making for the FCC to base policy on a system of barter which has been proven ineffective.

Exchange of goods or services (rather than currency) only occurs when both parties feel that they are better off through the exchange of goods or services. Parties will rely on a barter system when such an arrangement is welfare enhancing relative to some other means of exchange, such as a payment for the goods. Bartering is observed when traffic is in balance (as could be the case under voluntary as opposed to mandatory Bill-and-Keep), but it is not observed when the transaction would provide less welfare than a payment scheme.

The Commission Should Adopt a Pricing Structure Based on Capacity Charges

The NPRM proposes changes which would effectively use end-user charges to compensate carriers for call termination functions, but yet it acknowledges that costs may well now be more capacity-sensitive than traffic-sensitive. The NPRM states:

> "... the incremental costs of interconnection involve primarily capacity costs that should be recovered through flat charges. Accepting this latter assumption eliminates the need for traffic-sensitive interconnection charges."[27]

In the case of termination costs that are not traffic sensitive, capacity charges are the most efficient recovery mechanism. NASUCA's argument submitted in its original comments on this issue and on how capacity charges could be calculated is supported by the comments of

[25] Ad Hoc Telecommunications User Committee -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Pages 2-3

[26] CTIA -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 25

[4] NPRM -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Paragraph 28

several other parties including AT&T, Cbeyond, Global Crossing, and Mpower Communications.[28]

As pointed out by Ordover and Willig in their submission for AT&T, capacity charges are the best mechanism for recovering termination costs since the costs of terminating a call is determined by peak-usage. Provided that the capacity charges are based on forward-looking economic costs, they are an efficient means of recovering termination costs. There is no reason to believe the Bill-and-Keep would improve on the existing regulatory arrangements of the FCC and State Commissions.[29]

Capacity charges are an effective and efficient way for one carrier to pay another for using the other carrier's network. Yet it would be virtually impossible to assess such charges directly on end users. Hence it is reasonable -- and pro-competitive -- for each carrier to determine on its own how to recover the capacity charges from its customers.

Future Technology Changes will Further Support Capacity-Based Pricing

> It is also important to point out that technological advances also argue in favor of more carrier-paid capacity-based charges rather than direct end-user charges. In its Comments, Cbeyond points out that packet switching is replacing circuit switching and that carriers are interconnecting with high-capacity links.[30]

The Comments of Global Crossing also illustrate that future changes and next generation telecommunications technology will be consistent with an evolution towards capacity-based pricing as proposed by NASUCA.

> "By the Commission's own acknowledgement the policies adopted in this proceeding will not take full effect for at least five years. By that time, the industry will be radically different and the nature of networking will look nothing like it does today. The future is digital. The future is IP. The future is packets, not minutes. The Commission must not only conclude that 'a minute is a minute'. It must also conclude that 'a packet is a packet.' Moreover, the Commission must allow all packets to be exchanged without the distortion of past regulatory policies."

> "Despite the advance in thinking put forth by both white papers prepared by Commission staff, they continue to focus on interconnection to the incumbent telephone company's legacy, narrowband, circuit-switched network. By doing this, they are perpetuating the dominance of the incumbent carriers, prolonging the existence of compensation mechanisms based on circuit-switched networks,

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[28] NASUCA -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- See Pages **17-18** for the procedure for the calculation of capacity-based charges

[29] AT&T -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 23

[30] Cbeyond -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 5-6

and marginalizing the deployment of broadband infrastructure by new entrants."[31]

Clearly, such analysis presented by leading edge companies is a strong argument against Bill-and-Keep. The current tariffs for packet switching clearly illustrate that packet switching is offered on a capacity basis,[32] and cost analysts are able to easily determine the cost of providing capacity on a packet switch system. There is no evidence that firms that interconnect packet switching networks rely on Bill-and-Keep. Therefore the imposition of Bill-and-Keep would be contrary to the manner in which telecommunications pricing has evolved to reflect the cost structure of new technologies.

V. The NPRM has not Sufficiently Established that the Assumptions Underlying the Bill-and-Keep Proposals (COBAK and BASICS) are Robust

With regards to the specific proposals of BASICS and COBAK which are presented in the NPRM, NASUCA concurs with the analysis of the Minnesota Independent Coalition:

> "BASICS rests on assumptions that are clearly incorrect ... These assumptions include: 1) that all networks have the same scale economies; 2) that all networks have the same average number of subscribers per central office; and 3) that any departures from its size assumptions do not alter the analysis."[33]

> "COBAK rests on assumptions that are equally unsound ... These assumptions include: 1) that the originating and terminating networks have equal costs; 2) that having each customer pay all costs of its local network leads to equal sharing of costs; 3) that increases in local rates from reductions in access charges will lead to corresponding decreases in toll rates; and 4) that increases in rates experienced by customers in high cost areas will be 'slight.'"[34]

Further, Time Warner notes that COBAK assumes that interconnecting carriers have symmetrical marginal costs, but that this is unrealistic given that capacity costs vary with geographic area, and that different networks use different technologies and have different blocking probabilities.[35]

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[31] Global Crossing -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 4-5

[32] See, for example, Qwest, "Interconnection and Collocation for Transport and Switched Unbundled Network Elements and Finished Services," September 2001, at http://www.awest.com/wholesale/downloads/2001/O11017/77386 Issue G FD1.pdf, section 11; and Verizon, Wireless Handbook, Exchange Access Frame Relay, http://128.11.40.241/east/wholesale/wireless/wirelesshandbook 7.7.htm.

[33] Minnesota Independent Coalition -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 5

[34] Minnesota Independent Coalition -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) – Page 5

[35] Time Warner Telecom -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 5-7.

BASICS oversimplifies the working of the telecommunications industry. It is based on linear networks and simple calling models which oversimplify the realities of a continuously evolving industry like telecommunications.

Moreover, the COBAK and BASICS proposals at times contradict each other and ignore the interrelationship between intercarrier compensation schemes and retail rates.[36] COBAK argues that incremental interconnection costs are difficult to estimate, while BASICS assumes these costs can be determined and split between existing and new interconnecting networks equally.[37]

The argument that Bill-and-Keep would be a suitable default solution under COBAK is also specious. As argued previously, NASUCA believes that if Bill-and-Keep becomes the default, a carrier could always impose Bill-and-Keep on the other carrier.[38] Knowing that the default is Bill-and-Keep, there is no reason for a party who sends more traffic than it receives to agree to any form of reciprocal compensation. Therefore, Bill-and-Keep should not be the default -- instead the default should be a cost-based rate such as capacity charges.

Finally, as pointed out in NASUCA's Initial Comments, Bill-and-Keep has not been applied in any other industry characterized by networks where traffic is out of balance.[39] None of the respondents cited an example of an industry using Bill-and-Keep where traffic is out of balance. The reason for this is because people in network industries understand that Bill-and-Keep was tried and was a failure in the first telecommunications network, the telegraph.

The telegraph industry initially used a payment scheme where the terminating company received no payment. This method was quickly replaced with termination payments because too many messages went undelivered. Therefore, it is no accident that firms have privately adopted termination payments. The unregulated telegraph industry showed that without the proper financial incentive, poor service would be provided.

The Benefits of a Phone Call to the Call Receiver are Overstated

COBAK assumes that both parties to a telephone call benefit equally. Yet, it is impossible to measure the "value" or "benefits" of a telephone call – especially for the party receiving the call. The Commission therefore needs to avoid value-laden policy decisions which have no empirical or theoretical basis, and are bad policy. The "cost-causer" pays approach is the most efficient approach to allocating costs since it avoids value-laden judgements about the benefits of phone

[36] Allegiance Telecom -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 18-19

[37] Allegiance Telecom -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 21

[38] National Association of State Utility Consumer Advocates -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) – Page 29

[39] National Association of State Utility Consumer Advocates -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) – Pages 8-10

calls and to whom they accrue. Moreover, the benefits of a call cannot be estimated before a call is made since one can not possibly predict the precise "value" of a conversation.

As pointed out by Allegiance Telecom, the proliferation of products to screen unwanted calls (e.g., Caller ID or Call Waiting) clearly contradicts the assumption under COBAK that calling and called parties benefit equally from phone calls.[40] Without these devices, only the calling party has complete information regarding the purpose of a telephone call, and thus it should bear the costs of termination. Since not all consumers can afford or desire call-screening devices, policy changes that unnecessarily encourage their purchase would be a costly technology distortion.

Moreover, it is important to point out that there is no evidence that callers buy devices to make it impossible to block making phone calls -- perhaps with the exception of devices to limit the use of children or blocking unauthorized users in offices from abusing long distance service. The fact that consumers buy products to block receiving calls, but not to block making them clearly indicates that callers receive more benefits than receivers since only receivers have strong incentives to block calls. The asymmetry in both incentives and the actions taken by millions of individuals to restrict receiving calls, but not making them, thus undermines one of the most critical assumptions of Bill-and-Keep.

Under bill-and-keep, the cost of termination could be recovered through usage sensitive retail charges. Under such a pricing structure, customers would be charged for answering their incoming phone calls. As pointed out by Comptel, attributing cost causation to call receivers would undermine the use of telephone service since consumers would have less incentive to answer calls and to purchase answering machines. Since this would deter subscription and use of the public switched telecommunications network, this would be inconsistent with the statutory goals of the Commission.[41]

Clearly, sometimes people get more utility from placing calls, and other times people get more utility from terminating a call. Therefore it makes sense to have multiple pricing instruments such as 800 service for when the terminating party receives substantial benefits, and calling party pays when the originating party receives more of the benefits. Mandatory Bill-and-Keep would clearly distort consumer decisions by imposing a single rate structure regardless of consumer valuation of incoming calls. NASUCA contends that the market, rather than regulators, should sort out the pricing structure that is in the best interest of consumers.

Finally, no empirical evidence regarding the benefits of telephone calls is presented in any of the submissions by the proponents of Bill-and-Keep. Neither has the FCC cited any empirical support for its hypothesis of equal benefit. This is not surprising because no empirical research on this issue would be meaningful since there is no way to measure the distribution of benefits between a caller, a receiver, and even a third party who benefits while not being part of the conversation, A multi-billion dollar industry's interconnection policy should not be based on a

[40] Allegiance Telecom -- In the Matter of Developing *a* Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 21

[41] Comptel -- In the Matter of Developing *a* Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 12

hypothesis that has no empirical foundation or support in the operations of unregulated competitive markets, and is clearly contrary to the law.[42]

VI. The Proposed Changes do not Reflect a "Unified Intercarrier Compensation Regime

As pointed out in many of the comments, the proposed changes actually represent anything but a "Unified" approach to the problem of intercarrier compensation. The Ad Hoc Telecommunications Users Committee points out:

> "... the proposed NPRM would unnecessarily use different time schedules for application of the new regime to different types of intercarrier payments."[43]

At the same time, many of the proponents of Bill-and-Keep who submitted comments support only limited implementation of Bill-and-Keep; once again this could hardly be considered a "Unified" approach. For example, ATTWireless, CTIA, NEXTEL, PCIA, Voice Stream Wireless, and Verizon Wireless argue that Bill-and-Keep should be adopted for CMRS services. Others (e.g., Verizon) also propose limited adoption of Bill-and-Keep for ISP traffic. Quite clearly, all of these companies support limited implementation of Bill-and-Keep since it would benefit their bottom lines – not because there are any strong policy or economic reasons for doing so.

VII. The Positions of ILECs in the year 2001 Regarding the Issues of Bill-and-Keep and Reciprocal Compensation are Inconsistent with the Positions Taken in 1996

A review of the submissions provided by NYNEX, Bell Atlantic, Bell South, PACTEL, and GTE in the 1996 rule-making indicates a gaping disparity in the positions taken by these companies in 1996 and 2001 regarding the legality of Bill-and-Keep. In 1996, all of these companies were staunchly opposed to the idea of Bill-and-Keep or mandated reciprocal compensation agreements, whereas today their positions have shifted 180 degrees. The aforementioned companies, like the FCC, in 1996 concluded that it would be illegal to mandate Bill-and-Keep.

The change in the positions of the ILECs has nothing to do with any serious analysis. Instead it is motivated solely by the perceived gains and losses to ILECs. In 1996, ILECs saw Bill-and-Keep as a scheme to deny them revenues. The ILECs, based on their experience interconnecting with CMRS, anticipated that they would receive more traffic than they originated from their network. Consequently, they characterized Bill-and-Keep as "bilk and keep"[44]

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[42] NASUCA -- -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- See Pages 8-10 for a discussion of network interconnection in unregulated competitive industries, and Pages 27-30 for a discussion of legal issues.

[43] Ad Hoc Telecommunications User Committee -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 2

[44] See Bell Atlantic -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30, 1996 (CC Docket #96-98) -- Page 24 "The most blatant example of a plea for a government handout comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, which they euphemistically refer to as "Bill-and-Keep." A more

because it would deny them compensation for costs that they incurred terminating traffic that originated on the CLECs networks. Now that they have learned that more traffic originates on their network they have shifted their position 180 degrees.

Despite the surprise that funds flowed in the opposite direction that they anticipated, their legal analysis from 1996 is illuminating. The ILECs views in 1996, as well as the FCC's, will be a lightening rod to a court that will review this case if the Commission adopts Bill-and-Keep. Neither the FCC in its NPRM, nor the ILECs, have explained adequately why their initial interpretation of the law changed. The ILECs and the FCC concurred in 1996 that the law mandates reciprocal compensation as an option.

Below is a summary of the positions taken by key ILECs in 1996[45] and in the current proceedings in 2001. A series of quotes taken directly from the comments and reply comments of the ILECs in 1996 illustrates the flip-flop in the positions taken by ILECs as a whole regarding Bill-and-Keep and reciprocal compensation. It should be pointed out that their support of Bill-and-Keep is sometimes qualified and limited in 2001, but, in general, the ILECs now support Bill-and-Keep -- unlike in 1996. Moreover, several have offered their own proposals in the current proceedings to modify the Commission's proposals regarding Bill-and-Keep.

Comparison of 1996 and 2001 Positions of Selected ILECs on the Legality of Bill-and-Keep

U S WEST, INC. (NOW QWEST)

US West's Reply Comments in 1996 argued that neither State Commissions nor the FCC had the right to impose Bill-and-Keep, while in 2001 Qwest argues that "nothing in the Communications Act poses any substantive obstacle to Bill-and-Keep."[46] However, this is clearly contradicted by US West's Reply Comments in 1996 which addressed the issue of Call Termination as follows:

> "Requiring Bill-and-Keep would be in direct conflict with the 1996 Act. The 1996 Act requires "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; . . .." (Section 252(d)(2)(A)). While the Act permits "arrangements that waive mutual recovery (such as Bill-and-Keep arrangements)" this language merely permits parties, in their private negotiations, to enter into Bill-and-Keep "arrangements," thereby "waiving" the right to mutual recovery -- it does not permit a regulator to impose

appropriate name, however, would be "bilk and keep," since it will bilk the LECs' customers out of their money in order to subsidize entry by the likes of AT&T, MCI, and TCG."

[45] See Reply Comments of NYNEX, Bell Atlantic, Bell South, PACTEL, US West, and GTE: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 -- May 30, 1996 (CC Docket #96-98)

[46] Qwest Communications -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Page 45

such an arrangement. Absent such a "waiver by the parties to negotiation", the Act leaves no room for a state to impose Bill-and-Keep on any carrier."[47]

PACIFIC TELESIS GROUP (NOW SBC)

PACTEL's Reply Comments in 1996 argued that Reciprocal Compensation could flow only from negotiated agreements, which is diametrically opposed to SBC's position today. SBC now argues that the FCC has the authority to implement a uniform Bill-and-Keep regime for both interstate and intrastate traffic, and that mandatory Bill-and-Keep is consistent with the reciprocal compensation provisions of the Telecommunications Act of 1996. SBC states:

> "The Commission can adopt a mandatory Bill-and-Keep regime if it ensures there are end-user recovery mechanisms."[48]

All of this is flatly contradicted by the Reply Comments of PACTEL in 1996:

> "For transport and termination of local calls, the 1996 Act anticipates that reciprocal compensation will be determined by the parties. In contrast to Section 252(d)(1) (interconnection and network element charges) and 252(d)(3) (wholesale prices), Section 252(d)(2) does not provide that a state shall determine reciprocal compensation. Rather, Section 252(d)(2) requires a state to assure that agreements provide for the mutual and reciprocal recovery... Section 252(d)(2)(B)(i) does allow carriers to waive mutual recovery (such as Bill-and-Keep), but it does not allow regulators to mandate Bill-and-Keep, which would effectively read the additional costs standard out of the Act... Contrary to what DoJ asserts, Bill-and-Keep mav not be mandated (DOJ at 33-34). As DOJ admits, Bill-and-Keep arrangements effectively price termination at zero. (*Id.* at 34)."[49]

GTE, NYNEX, AND BELL ATLANTIC (NOW VERIZON)

Although Verizon's comments in these proceedings do not address the issue of Bill-and-Keep in detail, and do not comment on the legality of Bill-and-Keep, Verizon does argue that all internet bound traffic should be moved to Bill-and-Keep. In addition, Verizon lends qualified support for Bill-and-Keep provided that various implementation issues can be addressed. Yet this is in direct contradiction to the positions of GTE, NYNEX, and Bell Atlantic expressed in 1996.

GTE's 1996 submission clearly argued that only states have the right to impose reciprocal compensation agreements and not the FCC, and only where there are offsetting obligations. One of GTE's recommendations was:

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[47] Reply Comments of US West -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: May 30, 1996 (CC Docket #96-98) -- Pages 27-28

[48] SBC Communications -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21,2001 (CC Docket #01-92) -- Pages 38, 43

[49] Reply Comments of PACTEL -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: May 30, 1996 (CC Docket #96-98) -- Pages 47-49

> "Bill-and-Keep only where voluntarily agreed to by the parties, except a State may impose Bill-and-Keep only where it assures mutual recovery of costs through the offsetting of reciprocal obligations"[50]

GTE also went on to provide more detailed legal analysis in its 1996 submission:

> "Bill-and-Keep may be agreed to voluntarily and, in those rare circumstances in which it would actually "afford the mutual recovery of costs" (§ 252(d)(2)(B)(1)), may even be imposed by a state commission, but it can never be imposed by the FCC. TCG's claim (71) that Bill-and-Keep "is affirmatively endorsed by the 1996 Act" conveniently overlooks the fact that section 252(d)(2)(B), far from embracing Bill-and-Keep, permits it only under narrowly circumscribed conditions. The FCC cannot and should not mandate Bill-and-Keep."[51]

GTE's 1996 Reply Comments (Section F on Reciprocal Compensation) provided more detailed legal references regarding the role of the FCC, State Commissions, and the need for negotiation between parties.

> "The 1996 Act plainly requires that reciprocal compensation arrangements be negotiated between the parties. In the event the parties cannot agree, and only in that event, the statute authorizes a *state PUC* to establish compensation rates based on a reasonable approximation of the additional costs of transport and termination of traffic. §§ 251(b)(5), 252(d)(2)." (Italics from Original).[52]

NYNEX's 1996 Reply Comments echoed the positions of the other ILECs at that time – **"THE STATUTORY REQUIREMENT OF RECIPROCAL COMPENSATION FOR THE "TRANSPORT AND TERMINATION" OF CALLS DOES NOT <u>ENCOMPASS COMMISSION-MANDATED RATE STRUCTURES OR LEVELS"</u>** (Capitalization and underlining from original document)[53]

> "Under Section 251(b)(5), the LECs have "a duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The Commission inquires whether it is authorized to promulgate rules to guide the States in applying Section 252(d)(2) as to rate structure and rate levels, and specifically whether "symmetrical" or "Bill-and-Keep" arrangements may be required (NPRM ¶¶226-244). In fact, Section 251

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[50] GTE -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30, 1996 (CC Docket #96-98) – Page vi (Also see Attachment 1 of **GTE's** comments (GTE's Proposed Guidelines to Implement Sections 251(b) and 251(c)) which clearly argues for a State Commission to only be involved when negotiations between parties fail, and if it assures mutual recovery of costs through offsetting of reciprocal obligations:

[51] GTE -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications **Act** of 1996, May 30, 1996 *(CC* Docket #96-98) – Pages 56-59

[52] Reply Comments of GTE -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30,1996 (CC Docket #96-98) – Page 49

[53] Reply Comments of NYNEX -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30, 1996 (CC Docket #96-98) -- Page 43

does not authorize the Commission to establish mandatory rate structures or rate levels (NYNEX, pp. 84-90).

There can be no question that the Act does not countenance a single federal rate structure. Rather, these are to be negotiated by the carriers under Section 252 pursuant to State processes. Nevertheless, some commenters ask the Commission to specify a flat-rated structure. Although this may be appropriate with respect to the recovery of some costs, it may not be appropriate for other costs. NYNEX is not opposed to capacity-based, flat rate interconnection charges (as negotiated) in specific circumstances. However, the Commission should refrain from dictating a particular rate structure for all circumstances, and leave to the interconnecting parties the determination of a proper rate structure for their agreements.

Similarly, there is no basis for the Commission to pre-set a single "transport and termination" rate element, as some request. For example, some commenters ask the Commission to override state regulatory schemes that have established different interconnection charges for tandem and end office connections, such as New York has done. There is no basis in law for such a federal override of carefully drawn state policy and, indeed, such a determination would conflict with the cost recovery requirements of Section 252(d)(2) --unless all interconnection were priced to include the more costly provision of "transport and termination," clearly not the result commenters seek to secure.[54]

The 1996 Reply Comments of NYNEX also went on to address the issue of Bill-and-Keep more explicitly.

Section 252(d)(2) allows for "Bill-and-Keep" arrangements only on a voluntary basis, assuming the <u>waiver</u> of the parties to their respective rights to mutual compensation (NYNEX, pp. 88-90). The statute recognizes that such compelled arrangement would be confiscatory absent such agreement." (underlining from original document)[55]

In its Reply Comments in 1996, Bell Atlantic argued that <u>Prices for Reciprocal Compensation Cannot Be Set At Zero</u> (Emphasis from Original Document):[56]

"A regulatorily mandated price of zero -- by any name -- would violate the Act, the Constitution, and sound economic principles. <u>See</u> Bell Atlantic Br. at 40-42...

Indeed, the proponents of Bill-and-Keep appear to recognize the flaws in their proposal, and shift their focus here to arguing that the FCC should mandate Bill-and-Keep as an "interim" pricing mechanism, and as a default price when parties

[54] Reply Comments of NYNEX -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30, 1996 (CC Docket #96-98) -- Pages 43-44

[55] Reply Comments of NYNEX -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30, 1996 (CC Docket #96-98) -- Page 48

[56] Reply Comments of Bell Atlantic -- In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, May 30, 1996 (CC Docket #96-98) – Pages 23-25

> do not agree to a different rate. AT&T Br. at 69; MCI Br. at 52-53; TCG Br. at 83-84. This will create a "threat point," so the argument goes, that will encourage LECs to negotiate reasonable rates for reciprocal compensation. But whether they are termed interim or permanent, mandatory Bill-and-Keep arrangements suffer from the same flaws, and simply cannot be squared with the Act's mandate that LECs be permitted to recover their costs absent a voluntary waiver of that right. Bell Atlantic Br. at 42. Nor will adopting Bill-and-Keep as a mandatory solution encourage parties to negotiate a reasonable price. It will do the opposite. So long as competitors know that they can get a zero rate if they do not agree to something else, the result will be Bill-and-Keep in every case. (Emphasis from Original Document)
>
> Moreover, the notion that Bill-and-Keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and internet access providers. The LEC would find itself writing large monthly checks to the new entrant. By the same token, setting rates too low will merely encourage new entrants to sign up customers whose calls are predominantly outbound, such as telephone solicitors. Ironically, under these circumstances, the LECs' current customers not only would subsidize entry by competitors, but would subsidize low rates for businesses they may well not want to hear from."

NASUCA concurs with Bell Atlantic's 1996 submission. The market should be relied onto to establish the correct price for termination. The FCC should have faith that competitive forces will drive the market price to the economic cost of providing service. Furthermore, NASUCA concurs with Bell Atlantic that a zero termination fee would provide a subsidy to competitors and will "subsidize low rates for businesses [customers] may not want to hear from."

In 1996, the ILECs loathed Bill-and-Keep; now they love it. Casting further doubt on the ILEC position is the fact that they take inconsistent positions in different forums. For example, here SBC insists that the Commission should be "focusing on increasing residential service prices to levels that are self-supporting" before adopting Bill-and-Keep.[57] In a state proceeding in Ohio, SBC's subsidiary ILEC Ameritech Ohio has fervently supported a plan that will freeze basic residential service rates indefinitely, while increasing rates for optional services that are now widely acknowledged to be priced significantly above cost.[58] How Ameritech Ohio, while under

[57] SBC Communications -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 21. NASUCA absolutely opposes SBC's position that residential service is not self-supporting. However, SBC admits that this is really a universal service issue *(id.)*; the issue should be discussed in 96-45 and referred to the Federal-State Joint board on Universal Service rather than being addressed here. The key point here, in any event, is the inconsistency in ILEC positions.

[58] ***See*** Ameritech Ohio comments in PUCO Case No. 00-1532, *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies,* available at
http://dis.puc.state.oh.us/dis.nsf/0/E6085D7009D1A26785256994005D381C?OpenDocument&target="MainBody".

a state plan to freeze rates, could respond to FCC incentives to increase residential rates (SBC at **21)** is difficult to imagine.

VIII. Conclusion and Recommendations

The Commission's proposal to adopt mandatory Bill-and-Keep should be rejected on the following grounds:

(i) Legal grounds since it is not consistent with the Telecommunications Act of 1996, and would limit the role of State Commissions:

(ii) Practical grounds since it would increase the regulatory burden on the FCC and the State Commissions;

(iii) Analytical grounds since the NPRM has not sufficiently established that the assumptions underlying its Bill-and-Keep Proposals (COBAK and BASICS) are robust;

(iv) Equity grounds since the adverse equity and consumer impacts of Bill-and-Keep would lead to large increases in end-user charges – especially on rural consumers;

(v) Efficiency grounds since there is nothing welfare-enhancing about Bill-and-Keep − by controlling prices the market can not properly operate according to principles of market pricing (e.g., whereby different consumers pay different prices depending on if they highly value originating or terminating traffic; and

(vi) Policy grounds since judicious policy implementation requires instruments which are not clumsy, and allow for the balancing of multiple objectives and constraints − price controls disguised as Bill-and-Keep are well-known to be a clumsy instrument for prudent policy.

Instead, NASUCA recommends that:

(i) The Commission should adopt a pricing structure based on capacity charges − especially since future technology changes will further support capacity-based pricing;

(ii) The Commission should adopt only those policies which would not undermine or pre-empt the duties of State Commissions that have been expressly identified by Congress;

(iii) The Commission should not adopt policies such as Bill-and-Keep which would be anticompetitive;

(iv) The Commission should not adopt Bill-and-Keep because the support of the ILECs represents a flip-flop in their positions from 1996 to 2001 and indicates that many **are** adapting their positions to the situation rather than on any solid analytical basis; and

(v) The Commission should adopt only those policies which would not discourage the use of the internet, and technology advances, in general.

ꞮT OF SERVICE

I HEREBY CERTIFY that a copy of the Comments of the National Association of State Utility Consumer Advocates will be furnished to parties on the attached list.

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